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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANCISCO MILLAN,

Plaintiff - Appellant,

v.

MICHAEL D. MANSFIELD,

Defendant - Appellee.

No. 04-57021

D.C. No. CV-04-01296-CBM

MEMORANDUM^{*}

Appeal from the United States District Court
for the Central District of California
Consuelo B. Marshall, Chief Judge, Presiding

Submitted November 8, 2005^{**}

Before: WALLACE, LEAVY, and BERZON, Circuit Judges.

Francisco Millan, a California state prisoner, appeals pro se from an order of the district court denying his request for leave to proceed in forma pauperis (“IFP”) in a 42 U.S.C. § 1983 action against Michael D. Mansfield, the attorney who

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

represented Millan during a criminal trial. We have jurisdiction under 28 U.S.C. § 1291 and review for abuse of discretion, *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990). We affirm.

The district court correctly denied Millan's IFP application because Mansfield, a privately-retained attorney, did not act under color of state law, and therefore the complaint was frivolous. *See Minetti v. Port of Seattle*, 152 F.3d 1113, 1115 (9th Cir. 1998) ("A district court may deny leave to proceed [IFP] at the outset 'if it appears from the face of the proposed complaint that the action is frivolous or without merit.'") (quoting *Tripati v. First Nat'l Bank & Trust*, 821 F.2d 1368, 1370 (9th Cir. 1987)); *O'Loughlin*, 920 F.2d at 617 (IFP complaint "is frivolous if it has no arguable basis in fact or law") (internal quotation marks and citation omitted).

Moreover, Millan explicitly acknowledged in his complaint that Mansfield did not conspire with the prosecutor. *Cf. Tower v. Glover*, 467 U.S. 914, 920 (1984) (complaint alleging a conspiracy between defense counsel and the prosecution does state a claim under Section 1983).

AFFIRMED.